

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-6071

United States Court of Appeals FOR THE SECOND CIRCUIT

W. J. USERY, JR., Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellant,

—against—

COLUMBIA UNIVERSITY, et al.,
*Defendants-Third Party
Plaintiffs-Appellees,*

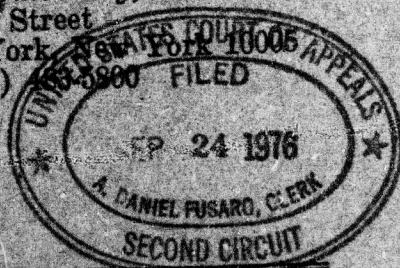
—against—

TRANSPORT WORKERS UNION OF AMERICA, et al.,
Third Party Defendants.

BRIEF FOR APPELLEES

THACHER, PROFFITT & WOOD
Attorneys for Defendants-Appellees
Columbia University, et al.
40 Wall Street
New York, New York 10005
(212) 580-5800

ROBERT S. STITT,
ANTHONY LIMITONE, JR.,
RAYMOND L. VANDENBERG,
Of Counsel.



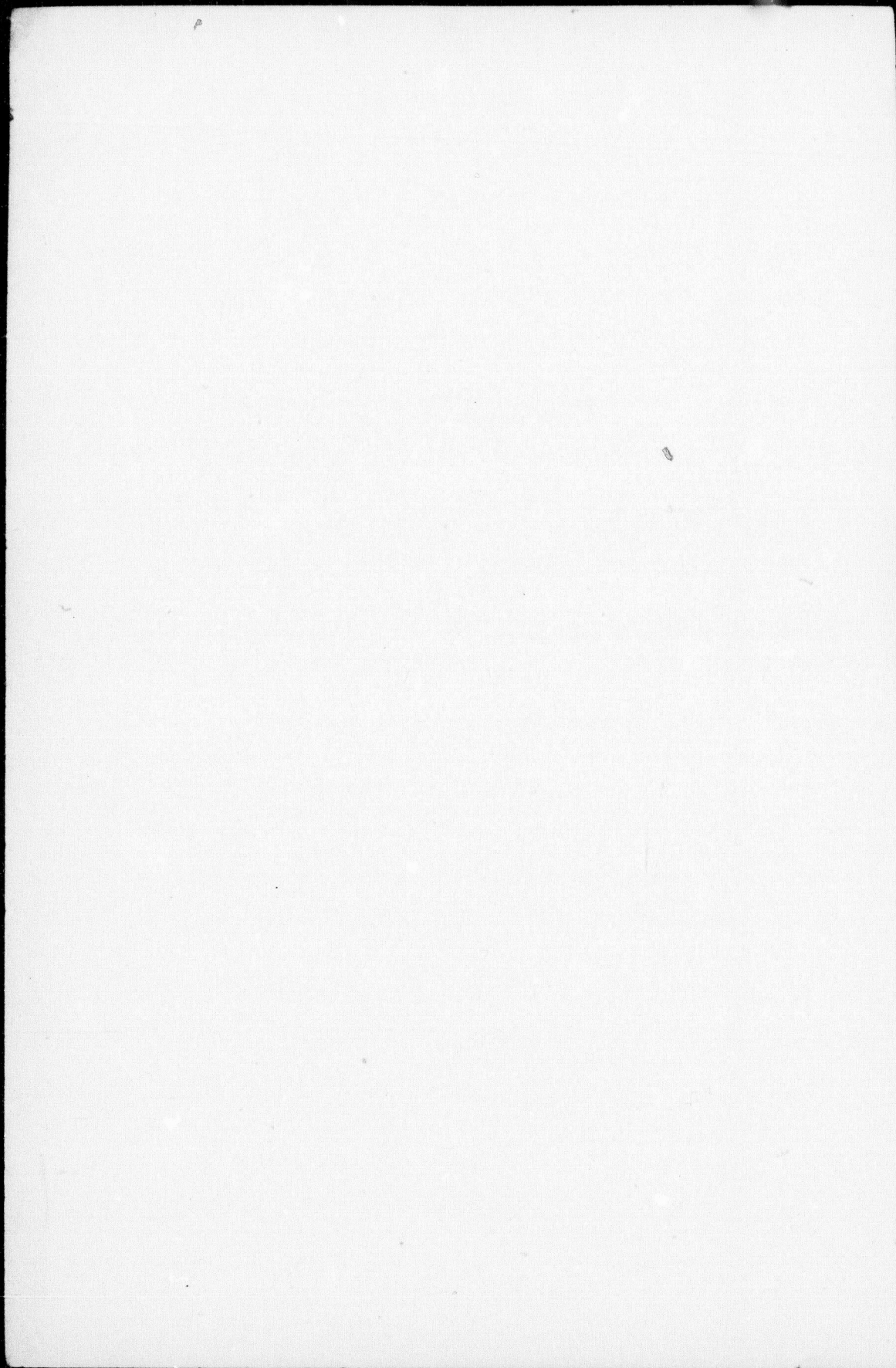


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BRIEF FOR APPELLEES

Preliminary Statement

The Secretary of Labor, ("Labor") has appealed from a judgment dismissing Labor's complaint against Columbia University ("University" or "Columbia") by the United States District Court for the Southern District of New York (Owen, D. J.) after trial without jury. The action was brought under the Equal Pay Act of 1963.

The District Court's nineteen page opinion was filed on February 17, 1976 and is reported at 407 F.Supp. 1370 (15-32a)*.

Questions Presented for Review

1. Did the District Court err in finding that the University's heavy cleaners performed heavy cleaning services such as removing heavy rubbish and garbage, cleaning and sanitizing public lavatories and wet-mopping corridors, stairways, elevators and lobbies?

2. Did the District Court err in finding that light cleaners are limited to doing light cleaning services such as dusting desks, tables and chairs, dust-mopping floors, spot cleaning walls (no higher than they can reach), polishing desks, emptying ashtrays, and with some exceptions, wastebaskets?

3. Did the District Court err in finding that the job of heavy cleaner involves greater effort than that of light cleaner?

4. Did the District Court err in concluding that Labor had failed to prove that the jobs of heavy cleaner and light cleaner entail equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions?

Proceedings Below

There were two actions before the District Court. The first was a suit by Cora P. Walker and twelve other light cleaners against their employer, Columbia, and against

* Citations are to the appendix, unless otherwise indicated.

their union (73 Civ. 2687) under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-2000e-15. The second action (74 Civ. 1129) was brought by Labor against Columbia for alleged violation of the Equal Pay Act of 1963, 29 U.S.C. §201 *et seq.* Both plaintiffs challenged the propriety of maintaining different pay scales for heavy cleaners and light cleaners. The *Walker* plaintiffs also asserted that they had been denied additional equal employment opportunities.

The actions were consolidated for trial purposes by order dated April 10, 1974. The actions were tried in installments commencing on September 9 and concluding on November 21, 1974. The plaintiffs called fifteen light cleaners within the University's Buildings and Grounds Department: Pearlie Mae Dickens, Sarah Moss, Esther Collier, Earlene Ellis, Fannie H. Maghee, Margaret Leonard, Rebecca Phillips, Violet Rawls, Eileen V. Robinson, Gloria Kirkland, Consuela Ortiz, Marie Louise Stampp, Belle Jacobson Seibert, June Isabell and Thelma Williams; two former light cleaners now employed as security guards: Mrs. Walker and Joyce Forbes; two light cleaners within the Residence Halls Department; Nellie Thomas and Eloise Tookes; six heavy cleaners within the Buildings and Grounds Department: John Sampson, Jose Garcia, Irenio Cordero, Augusto C. Peralta, Wilbur Beaton and Jose Luis Requeijo; and Keith A. Gubb, divisional sales manager of the Clarke Floor Machine Company.

The University called Joseph P. Nye, its vice president for business; Nathan Shervington, its night superintendent, Buildings and Grounds Department; and John C. Gardner, its director of Buildings and Grounds. The University introduced portions of the depositions of three Labor officials designated and examined before trial as representatives of the Secretary (1079-81a): Abraham Klainbard, area director, George Barish, compliance officer and Norman Bromberg, assistant area director.

The Union called its international vice president, Joseph Hanaberry. The Union's local president, William Lyons, was called by the plaintiffs as a rebuttal witness. Approximately fifty exhibits pertinent to the equal pay issues were received in evidence. The trial required fifteen days.

The District Court's opinion directing the dismissal of both complaints (and Columbia's third party action against the Union) was filed on February 17, 1976. The plaintiffs in both actions filed notices of appeal. The Walker plaintiffs withdrew their appeal following a pre-argument conference (Docket No. 76-7214, Stipulation and Order, dated May 25, 1976).

Statement of Facts

The following facts are supported by substantial evidence:

Background

1. The appellant is the Secretary of Labor. The appellee University is a non-profit institution of higher learning with a principal location at Morningside Heights. The Transport Worker's Union of America, AFL-CIO and its Local Union No. 241 (collectively "the Union") are unincorporated associations with principal offices in New York City. The Union has been the exclusive bargaining agent for all of the University's custodial and maintenance employees at Morningside Heights since about 1945 (Opinion 16a; Exhibit 115; *Nye* 1155-57a).

2. The University has, for at least 30 years prior to March 11, 1971*, and continuing through the present date,

* The earliest date mentioned in Labor's complaint, as amended. (Opinion 16a).

maintained separate job classifications and paid different wages for heavy cleaners (formerly designated "janitors" or "shower maids") and light cleaners (formerly designated "maids") (Opinion 16-17a; *Nye* 1141-42a, 1245-46a). No male has ever applied for a light cleaner position (Opinion 16a; cf. *Nye* 1217a). Both males and females have applied for and have been accepted as heavy cleaners (Opinion 16-17a, 26-27a; *Nye* 1245-46a, 1249-50a, 1196-98a; Exhibit AA; *Rawls* 614-15a; Exhibit BB, 1551a; *Shervington* 1277a).

3. Dating back to at least the early 1940's, the heavy cleaner category has included women charged with the duty of cleaning the lavatories and shower facilities in the dormitories such as Johnson Hall, reserved exclusively for women (Opinion 16-17a; *Nye* 1140-42a; Labor Exhibits 112, 111, 110, 108; *Tookes* 641-43a). There are presently two women (one full time and one part time) who perform this duty on a permanent basis and receive heavy cleaner pay (Opinion 16-17a; *Nye* 1224-25a).

4. Since the mid-1940's, the University has also paid heavy cleaner wages to light cleaners working in the Residence Halls Department for those periods in which they were asked to perform and did perform heavy cleaner duties (Opinion 17a; *Nye* 1141-45a; *Tookes* 643-45a; University Exhibit U and schedule annexed thereto, 1555-58a). For example, during the summer of 1970, six light cleaners in the Residence Halls received heavy cleaner pay when they volunteered for heavy cleaner duties (University Exhibit U and schedule annexed thereto, 1555a; cf. *Thomas* 553-60a).

5. Since 1945, all collective bargaining agreements between the University and the Union have contained the following provision:

"An employee temporarily performing the work of another employee in a job classification to which a

higher rate of pay is attached shall receive such higher rate for the time during which he performs the work of the employee in the higher classification" (Opinion 21a; *Nye* 1246-48a; Walker Exhibit 12 and Labor Exhibit 115).

So far as is known, no claims have been asserted against the University pursuant to this clause (Opinion 21a, *Nye* 1247-49a, 1182-83a).

Job Descriptions

6. Commencing with the 1970 contract and at all times thereafter written job descriptions for each job classification, including heavy cleaners and light cleaners, have been incorporated by reference into the collective bargaining agreements between the Union and the University (Opinion 17a, *Nye* 1160-63a; Walker Exhibit 12; Labor Exhibit 104, 1543a; University Exhibit A, par. 4, 1549a; *Walker* action, Union's Ans. par. 89, Tr. 1072a).

7. The pertinent job description for heavy cleaners, prepared by the University under date of November 6, 1969, provides:

Performs heavy cleaning duties in academic and research buildings including any or a combination of the following:

Operating heavy motor driven cleaning equipment
Wet mopping floors
Stripping floors
Washing walls, glass partitions and blackboards
Polishing marble or brass
Moving furniture within rooms being cleaned
Hosing sidewalks
Shovelling snow from front stoops and entranceways

Removing heavy rubbish
 Changing light bulbs and fluorescent tubes
 Turning on and off ventilation equipment

He will also perform such tasks as:

Dusting
 Waxing
 Spot removal of carpeting
 Shampooing of carpeting
 Washroom and toilet cleaning
 Receiving and storing of 55 gallon drums, paper supplies and other housekeeping supplies and equipment

Janitors are responsible for the safekeeping, minor repairs and preservation of all janitorial equipment. They are also responsible for locking up and securing buildings, offices, classrooms, auditoriums, etc.

(Opinion 17-18a; University Exhibits S and S-1; *Gardner* 1516-20a).

8. The pertinent job description for light cleaners, also prepared under date of November 6, 1969, provides:

Maids perform light cleaning duties in all academic and research buildings and are usually limited to such tasks as:

Sweeping
 Dust mopping
 Vacuuming
 Dusting and polishing furniture
 Emptying wastebaskets
 Removing finger marks and wall washing as high as they can reach without using stepladders or other devices

Maids are also responsible for policing ladies' toilets and refurbishing supplies in same including, sanitary napkins, toilet tissues, towels and soap

(Opinion 18a; University Exhibits T and T-1; *Gardner* 1516-20a).

Duties and Equipment of Heavy Cleaners

9. At all material times, in accordance with the job description set forth in paragraph 7, heavy cleaners have performed heavy cleaning services such as removing heavy rubbish and garbage, cleaning and sanitizing public lavatories, and wet-mopping corridors, stairways, elevators and lobbies (Opinion 18a; *Shervington* 1266-67a, 1268-69a, 1274-80a, 1283a, 1285-90a, 1301-03a, 1309-11a, 1355-58a, 1399a, 1424a; *Nye* 1134-40a, 1146-47a; *Bromberg* 1119-23a; *Walker* 1562-65a, 168-70a; *Dickens* 90-94a, 100-01a, 104; *Moss* 251-56a; *Sampson* 328a, 336-42a, 352-53a, 345-60a, 372-77a; *Ellis* 387-88a, 393-98a, 400-03a; *Garcia* 469-70a; *Cordero* 476-80a, 483a, 486-95a; *Leonard* 514-16a, 519-20a, 528a; *Thomas* 566-67a, 571-72a; *Phillips* 582-86a; *Rawls* 609-10a; *Tookes* 638-39a, 649-50a; *Peralta* 709-12a, 735-50a, 740-45a; *Ortiz* 803-10a; *Stampp* 836-37a; *Seibert* 865-67a; *Requeijo* 890-91a, 894-98a; *Isabell* 1018-19a; *Williams* 1050-51a, 1054a-61a).

10. The tasks mentioned in the preceding paragraph are performed by the heavy cleaners on a daily basis (Opinion 18a; *Nye* 1209-10a; *Shervington* 1267a, 1269a, 1272-74a, 1276-90a, 1292-94a, 1301-02a, 1345-46a, 1460a, 1480-81a; *Dickens* Tr. 217-18; *Sampson* 342a, 356a, 362-63a, 366-67a; *Ellis* 403a; *Maghee* 437-42a, 444-46a; *Cordero* 486-92a; *Leonard* 514-15a, 519-520a; *Kirkland* 692a, 695a; *Peralta* 709-10a, 730-47a, 740-45a; *Beaton* 750a, 782a, 785-86a, 789-90a; *Ortiz* 804-07a; *Seibert* 856a, 865a, 868a, 870a; *Requeijo* 890a, 895-96a; *Isabell* 1018-19a, 1021-24a; *Williams* 1050-51a, 1054-57a).

11. In addition, heavy cleaners do "project work" which includes stripping floors,* waxing floors,* shampooing carpets,* washing walls, high dusting and venetian blind cleaning (Opinion 19a; *Shervington* 1667-69a, 1272a, 1276-77a, 1279-80a, 1284-85a, 1288-89a, 1291-92a, 1296a, 1345a, 1378a, 1445a, 1454-55a, 1456-57a; *Leonard* 516a; *Kirkland Tr.* 1103; *Peralta* 710a, 739-40a; *Ortiz* 806a; *Seibert* 867a). Such project work is performed on a regular, rotating basis throughout the University's buildings (Opinion 19a; *Shervington* 1487-89a, 1266-69a, 1272a, 1274a, 1276-77a, 1279-80a, 1284-85a, 1288-89a, 1291a, 1296a, 1345-46a, 1378a, 1456-57a; *Kirkland Tr.* 1103; *Peralta* 716-20a, 739-40a).

12. Heavy cleaners are assigned to lobbies, stairways, elevators, corridors and public lavatories (Opinion 18a; *Shervington* 1267a, 1269-72a, 1274a, 1276a, 1278-89a, 1292-94a, 1296a, 1481a; *Dickens* 90a; *Walker* 159a; *Sampson* 342a, 355a, 358a; *Ellis* 395-96a; *Maghee* 434-35a, 437-39a; *Leonard* 513-15a; *Thomas* 566-68a; *Phillips* 582-86a; *Rawls* 609-11a; *Tookes* 638-39a; *Robinson* 670-72a; *Kirkland* 691-94a; *Stampp* 836-38a; *Seibert* 865-67a; *Requeijo* 890a; *Isa-bell* 1018-19a, 1022-23a; *Williams* 1050-51a).

13. The hallways, elevators, lobbies and lavatories which are assigned to the heavy cleaners are public areas used by countless persons each day (Opinion 18a; *Samp-*

* As indicated *infra* in paragraph 27, pursuant to the 1970 Union agreement, heavy cleaners receive an additional \$.25 per hour when operating heavy motor driven equipment for stripping and waxing floors or shampooing carpets (Opinion 23-24a; *Nye* 1169-71a). In deciding that the jobs of light cleaner and heavy cleaner are not equal under the Equal Pay Act standard the court did not consider the use of such heavy floor machines (Opinion 23-24a). Prior to 1970, heavy cleaners performed floor machine work without extra compensation (*Nye* 1131a; University Exhibits S and T and Labor Exhibits 105-15 and 131, 1546a).

son 358a; *Shervington* 1270-71a, 1406-07a; cf. *Gubb* 925-27a). As a result, a more intensive cleaning effort is required because of the greater concentration of dirt and grime (*Gubb* 926-27a; *Shervington* 1270-71a, 1406-07a; cf. *Opinion* 24a).

14. Heavy cleaners are assigned to high places requiring the use of ladders (*Opinion* 18a; *Walker* 168-69a; *Sampson* 368a, 376-77a; *Maghee* 446-47a; *Shervington* 1554-55a, 1285a; *Nye* 1137a; *Klainbard* 1102a; cf. *Requeijo* 889a). Heavy cleaners are also responsible for all custodial work which is performed alone, at night, in off-campus buildings located outside the University's security perimeter (*Opinion* 18-19a; *Shervington* 2095-96a, 1496-98a; *Gardner* 1524-25a, 1525-26a; *Peralta* 734-35a; cf. *Moss* 213a; *Shervington* 1357a).

15. In addition to the floor machines mentioned in the footnote to paragraph 11, heavy cleaners also use the following equipment for which they do not receive a premium:

(a) *Heavy Mopping Equipment*—this equipment includes two 44 quart pails plus wringers, a dolly and solution which weigh from 60 lbs. empty to 140 lbs. full and mop trucks which come in two sizes—30 gallons and 60 gallons—and which weigh from 160 to 200 lbs. empty and from 300 to 540 lbs. full (*Opinion* 19a; *Shervington* 1297-1300a, 1307-09a; *Klainbard* 1098-99a; *Barish* 1113-14a; *Requeijo* 890-91a, 893a, 901-02a, 1006-09a; *Exhibit R*, 1559-62a, 1578-80a, 1583-84a; *Moss* 248-49a; *Sampson* 357-58a, 362-63a; *Leonard* 517-18a; *Rawls* 612-13a, *Tr.* 981; *Peralta* 730a, 741-42a; *Stampp* 840a; *Williams* 1059a).

(b) *Trash Trucks*—these trucks are approximately six feet long, three feet wide and six feet high (Exhibit R, 1563-64a; *Sampson* 364-67a) and weigh from 200 lbs. empty to 800 lbs. full (Opinion 19a; *Shervington* 1301-03a; *Ortiz* 807a; *Seibert* 856a, 870a; *Requeijo* 895-96a). They must be loaded and pushed to dumping areas daily (Opinion 19a; *Shervington* 1301-02a; *Cordero* 491-92a; *Maghee* 445-46a; *Sampson* 363-64a, 369-70a; *Requeijo* 895a).

(c) *Industrial Type Wet/Dry Vacuum Cleaners*
These machines are much larger and heavier than the upright household types used by the light cleaners and range from 74 to 96 lbs. empty and from 122 to 192 lbs. full (Opinion 19a; Exhibit R, 1568-69a, 1573-75a; *Shervington* 1304a, 1306a, 1418-19a, 1466a, 1469-70a, 1500-02a; *Klainbard* 1099a; *Bromberg* 1122-23a; *Gubb* 964-66a, 988-89a; *Walker* 155-56a; *Kirkland* 700a; *Stampp* 831a; *Williams* 1060-61a). Such vacuums cost approximately \$500 (*Gubb* 964-65a). The carpetsweepers and household upright vacuums used by the light cleaners cost from approximately \$25 to \$60 each (*Gubb* 951a, 961a; Labor Exhibit 127).

(d) *Ladders*—the heavy cleaners change light bulbs, wash walls and dust in high places which require the use of 14 foot ladders and platforms (Opinion 18a; *Shervington* 1285a, 1454-55a, Tr. 2234; *Klainbard* 1102a; *Barish* 1115a; *Moss* 213a; *Sampson* 368a, 376-77a; *Maghee* 446-47a; *Leonard* 522a; *Tookes* 630-31a; cf. *Requeijo* 889a).

(e) *Pile Lifters*—these motor powered machines are used to clean and rehabilitate carpets which have absorbed a considerable quantity of dirt and grime (Opinion 19a; *Shervington* 1303-04a; *Tookes* 640-41a, 656a). Such machines operate at high veloci-

ty with a "very aggressive" brush (*Gubb* 958-59a; Exhibit R, 1567a).

(f) *55 Gallon Drums*—these drums contain cleaning solvents which, depending on the type of solution, weigh from 400 to 600 lbs. (Opinion 19-20a; *Bromberg* 1120-21a; *Nye* 1146-47a; *Gardner* 1514a; *Walker* 164-65a; *Moss* 199-201a, 249a; Exhibit J; *Leonard* 522a; *Beaton* 766-67a; *Stampp* 840a).

Duties and Equipment of Light Cleaners

16. Light cleaners, in accordance with the job description set forth in paragraph 8, are limited to doing light cleaning services such as dusting desks, tables and chairs, dust mopping floors, vacuuming, spot cleaning walls (no higher than they can reach); polishing desks, emptying ashtrays and, with some exceptions, wastebaskets (Opinion 20a; *Shervington* 1268a, 1269-70a, 1275a, 1278-79a, 1281a, 1283-84a, 1285a, 1286a, 1287-83a, 1290a, 1372a; *Dickens* 43a, 66-71a; *Walker* 147-48a, 151-53a; *Forbes* 173-77a; *Moss* 236-38a; *Collier* 272-78a, 288-89a; *Ellis* 380a, 383a, 384a, 389-91a; *Maghee* 411a, 415a, 416a, 431-33a; *Leonard* 511-12a; Labor Exhibit 120; *Thomas* 549-50a, 563-64a; *Phillips* 580-81a; *Rawls* 606-07a; University Exhibit L; *Tookes* 632-35a; *Robinson* 668-69a; *Kirkland* 687-89a; *Ortiz* 801-02a; *Stampp* 833-36a; *Seibert* 862-63a; *Isabell* 1012-17a; *Williams* 1051-52a; *Klainbard* 1097a; *Barish* 1113a; *Nye* 1148-49a, 1182a, 1209-10a; University Exhibits T and Z, 1585-86a). When absences occur, light cleaners are instructed to fill in for other light cleaners but they are never required to fill in for heavy cleaners (Opinion 20a; *Dickens* 65a; *Moss* 266a; *Leonard* 523a; *Tookes* 628-29a; *Robinson* 667a; *Kirkland* 686-87a; *Ortiz* 799a; *Stampp* 841a; *Seibert* Tr. 1364).

17. Light cleaners are assigned to reading rooms, seminar rooms, laboratories, classrooms, offices and some pri-

vate lavatories (Opinion 20a; *Shervington* 1268a, 1275a, 1277-73a, 1281a, 1283-84a, 1286a, 1290a; *Forbes* 173-74a, 177a; *Moss* 237-39a; *Leonard* 510-11a; *Phillips* 579-80a; *Rawls* 606a; *Tookes* 634-35a; *Robinson* 668a; *Kirkland* 687a; *Ortiz* 801a; *Stampp* 832-34a; *Seibert* 849-50a, 865-66a; *Isabell* 1010-12a; *Williams* 1051a; *Bromberg* 1124a; *Collier* 291-95a; *Shervington* 1405-07a). Their corridor work is limited to dust mopping or carpet sweeping (*Phillips* 579a; *Tookes* 634a; *Ortiz* 801a; *Stampp* 833a; *Isabell* 1012a).

18. Light cleaners' equipment consists of rags, sponges, dustpans, dust mops, toy brooms, upright household vacuum cleaners, manual carpetsweepers and occasionally light wet-mopping equipment (Opinion 20a; *Dickens* 90-94a; *Walker* 152-56a; *Collier* 291-95a; *Moss* 230a, 236a; *Ellis* 391-92a; *Leonard* 512-13a; *Thomas* 563-66a; *Phillips* 580-82a; *Rawls* 607-09a; *Tookes* 619a, 635-37a; *Robinson* 669-70a; *Kirkland* 688-89a; *Ortiz* 802-03a; *Stampp* 828-29a, 835-36a; *Seibert* 864-65a; *Isabell* 1011-12a, 1014-15a; *Williams* 1052-54a). Some carry their equipment in wastemobiles, carts, pails or shopping bags (Opinion 20a; *Leonard* 512a; *Thomas* 565-66a; *Phillips* 581-82a; *Rawls* 595, 597a, 608a; *Tookes* 637a; *Robinson* 669a; *Kirkland* 688-89a; *Ortiz* 803a; *Seibert* 864a; *Isabell* 1015a; *Williams* 1053-54a; *Shervington* 1498-99a; Exhibit R, 1576-77a).

19. Light cleaners do not handle any of the equipment described in paragraph 15 (*Shervington* 1297-1301a, 1303-04a, Tr. 2145-46, 1470-71a; *Klainbard* 1096-1102a; *Barish* 1112-16a; *Dickens* 97-100a; *Walker* 146a, 155-56a, 158-63a; *Moss* 247-49a, Tr. 424; *Collier* 297-99a; *Maghee* 439-41a, 443-44a, 447a; *Leonard* 516-18a, 520-22a; *Thomas* 568-71a; *Phillips* 586-88a; *Rawls* 612-13a; *Tookes* 625a, 630-31a, 640-41a; *Robinson* 676-79a; *Kirkland* 695-98a, 700a; *Ortiz* 807-10a; *Stampp* 830a, 839-40a; *Seibert* 856-57a, 863a, 871a; *Requeijo* 896a; *Isabell* 1024-28a; *Williams* 1056-61a; cf. Opinion 20a).

Controls

20. The collective bargaining agreements between the University and the Union have long provided for a grievance procedure which has been used to insure the University's compliance with the job descriptions (Opinion 20-21a; Walker Exhibit 12; Labor Exhibit 115 and University Exhibit Z, 1585-86a; *Nye* 1176-77a). Most complaints of this nature are resolved at the supervisory level (Opinion 21a; cf. *Dickens* 94-96a, Tr. 220-21). For example, in August 1971 a group of eight light cleaners complained that they had been obliged to haul heavy garbage at Schermerhorn Extension (Opinion 24a; University Exhibit Z, 1585a; *Nye* 1181-82a). This matter was corrected immediately by the night superintendent, Mr. Shervington, who directed the janitors to haul away such trash (Opinion 24a; University Exhibit Z, 1585a; *Nye* 1182a).

21. Supervisors and employees are well aware of the demarcation line between the duties of light cleaners and heavy cleaners (Opinion 21a, 24a; *Nye* 1181-82a; Walker Exhibit 12 and University Exhibit Z, 1585-86a; *Dickens* 94-96a, Tr. 220-21; Walker 165-67a; Sampson 363-64a, 369-70a; Maghee 439-41a, 447a; Tookes 630-31a; Robinson 672-74a, 676-78a; Ortiz 806-10a; Seibert 852a, 866a; Williams 1057-62a). Supervisory personnel regularly monitor the work of heavy cleaners and light cleaners to insure that the distinction between the two jobs is maintained (Opinion 21a; cf. *Shervington* 1372-73a, 1391-94a, 1431-41a; University Exhibits S and T; Labor Exhibit 131, 1545a; *Gardner* 1521-22a). If an overlap in the duties occurs, supervisory personnel will order appropriate corrective action (Opinion 21a, 24a; cf. *Dickens* 94-96a, Tr. 220-21; University Exhibit Z, 1585a; *Nye* 1182a). For example, heavy cleaners, not light cleaners, empty the wastebaskets in a number of locations, including the Journalism Building, where wastebaskets contain magazines,

books and other heavy material (Opinion 21a; *Shervington* 1273-74a, 1279-81a, 1309-10a, 1424a, 1480a; *Walker* 149-51a).

Union Negotiations

22. Collective bargaining agreements between the University and the Union are usually renegotiated every two years (Opinion 22a; Labor Exhibits 106-16). The first step in the bargaining process is for the local to have a meeting, advertised to the entire membership, in order to decide on the proposals which will be made to the University (*Hanaberry* 1535a). The local also selects a negotiating committee which then meets with an officer of the international union (*Hanaberry* 1535-36a). A written list of proposals is then prepared and forwarded to the University (*Hanaberry* 1535a; *Nye* 1158-59a; University Exhibit Y).

23. Dating back to the 1940s, women have always been members of the Union's negotiating committee (Opinion 22a; *Nye* 1154-55a; University Exhibits D and W). The committee has included international officers who were well aware of the Union's obligation under federal law to represent all of its members without discrimination (*Hanaberry* 1538-39a). The Union committee has also had the benefit of counsel experienced in labor law and union contract negotiations (Opinion 22a; *Hanaberry* 1538-39a).

24. Dating back to at least 1950, women have been members of the University's negotiating team (Opinion 22a; *Nye* 1152a; University Exhibits D and V). The University's negotiating team included persons who were aware of its obligation to give equal pay for equal work (*Nye* 1240a). The University has had the benefit of coun-

sel experienced in labor law and union contract negotiations (Opinion 22a; *Nye* 1155-56a).

25. After agreement has been reached at the bargaining table, the terms of the proposed contract are explained to the membership and a secret ballot is taken (Opinion 22a; *Hanaberry* 1537a). After approval by the membership of the local, the contract is executed, printed and copies are distributed (Opinion 22a; *Nye* 1257-59a; Labor Exhibits 105-15).

1970 Agreement

26. The 1970 agreement between the Union and the University was negotiated, as in the case of previous agreements, with women on both sides of the bargaining table (Opinion 22a; *Nye* 1152-55a; University Exhibits V and W). Three light cleaners were members of the Union's negotiating committee (Opinion 22a; *Nye* 1182a; University Exhibit W). Both sides were represented by counsel (Opinion 22a; *Nye* 1155-56a; *Hanaberry* 1538-39a). An official of the Federal Mediation and Conciliation Service attended the last eight sessions and was instrumental in bringing the parties together and in reaching a contract (Opinion 22a; *Hanaberry* 1540-41a; *Nye* 1156-57a, 1164-67a).

27. It was agreed that the heavy cleaners (then designated "janitors") would receive an additional \$.25 per hour above their regular hourly rate while working with floor machines (*Nye* 1169-74a; *cf.* Opinion 24a). In previous years, heavy cleaners performed floor machine work without extra compensation (*Nye* 1131a; University Exhibits S and T, Labor Exhibits 105-15 and 131). In advancing this proposal in 1970, the Union took the position that additional pay over and above the stipulated hourly

rate was justified because floor machine work was difficult and required a degree of proficiency sufficient for premium pay (*Nye* 1173a; University Exhibit Y, Item 55; cf. *Shervington* 1315-18a; *Gubb* 989-90a). There was no Union proposal that the pay scales for heavy cleaners and light cleaners should be the same* (Opinion 22a; University Exhibit Y; *Nye* 1182-83a; *Hanaberry* 1536-37a).

28. The 1970 contract, like all the other collective bargaining agreements, was executed by the University and the Union in good faith and in the firm belief that the agreement was in compliance with federal law (Opinion 22a; *Nye* 1238-39a, 1240a, 1257-61a; *Hanaberry* 1536-39a; *Walker* action, Union Ans. pars. 89, 90, 97-99, 1072-73a; cf. *Libow* 378a).

Heavy Cleaner Opportunities

29. Employees are notified of promotional opportunities by postings placed in conspicuous places throughout the University, including the time clocks used by employees in the Buildings and Grounds and Residence Halls departments (Opinion 25-26a; *Nye* 1183-87a, 1199-1200, Tr. 2269-71; *Walker* Exhibits 7-10; *Walker* Tr. 253-54; *Leonard* 528a; *Thomas* 552-53a; *Phillips* 588a; *Rawls* 613-15a; *Robinson* 680a; *Kirkland* 698a; *Ortiz* 809-10a; *Stampp* 832a; *Seibert* 850-54a; *Williams* 1061-62a; *Barish* 1116a). Such postings are not restricted as to sex (*Walker* Exhibits 7-10; *Barish* 1116a). It has been a long-standing University practice that present employees receive initial consideration for any and all job vacancies at the University (Opinion 26a; *Nye* 1186-87a, Tr. 2278-81).

* No such demand was made until January 1972 after the University had given a since withdrawn notice of lay-off to approximately 30 light cleaners (cf. *Nye* 1209-14a, 1256-57a; *Walker* complaint par. 77; *Klainbard* 1083a).

30. In August 1972, the University posted job openings for six heavy cleaner positions within the Buildings and Grounds Department (Opinion 26a; *Moss* 251a; University Exhibit BB, 1551a). The posting resulted in applications from ten light cleaners (Opinion 26a; University Exhibit BB, 1551a). All of the applicants were interviewed; two asked that their names be withdrawn and a third was not accepted because of her attendance record (Opinion 26a; University Exhibit BB, 1551a). The seven remaining applicants were accepted and commenced training as heavy cleaners on August 29, 1972 (Opinion 26a; University Exhibit BB, 1551a; *Moss* 251-53a).

31. During the training period, each was given on-the-job instruction and training in heavy wet-mopping and other duties performed by heavy cleaners (University Exhibit BB, 1551a; *Moss* 251-53a, 255-56a). Each was paid at the heavy cleaner rate, including the bonus of \$.25 per hour for floor machine work (*Moss* 209-10a; University Exhibits FF and GG; *Gardner* Tr. 2485-95). The trainees received encouragement from Mr. Shervington and the trainer, Mr. Thomas (Opinion 26a, 30a; *Moss* 257a, 264a). They were treated fairly in every respect (Opinion 26a; *Moss* 264a).

32. After periods ranging from approximately three to seven weeks, Nellie Diaz, America Francisco, Catherine Nesbitt and Mrs. Moss each transferred back to light cleaner at her own request (Opinion 26-27a; University Exhibit BB, 1551a; *Moss* 261a). In October 1972, Rachel Boler, who had signed posted notices for security guard, was interviewed for a guard position (Opinion 27a; *Gardner* Tr. 2510-11; *Walker* Exhibit 5). She accepted the job (which pays more than heavy cleaner) and still holds that position (Opinion 27a; *Nye* 1189-91a). Helen Gilliam and Betty Thomas are still employed as heavy cleaners within the Buildings and Grounds Department (Opinion 27a; University Exhibit BB, 1551a; *Moss* 252-53a, 260a).

33. Pursuant to a supplemental agreement with the Union, the University posted openings for six additional heavy cleaner positions in September-October 1972, with light cleaners being given the first opportunity to bid these new positions (Opinion 27a; University Exhibit A, par. 5, 1549a; *Nye* 1199-1200a). Notwithstanding these and subsequent postings, no additional light cleaners have applied for jobs as heavy cleaners (Opinion 27a; *Nye* 1200a). Some testified that they never applied for a heavy cleaner position because they could not or preferred not to perform heavier work (Opinion 26a, 29a, 31a; *Ortiz* 809-10a; *Seibert* 851-52a; *Walker* 165-68a).

POINT I

The District Court's decision should be affirmed.

Labor undertook to prove a pattern of discrimination in the work performed and the compensation received by more than 200 heavy cleaners and light cleaners in more than 40 buildings at Morningside Heights (313-14a, 378a). As demonstrated by the District Court's opinion (15-32a) and the foregoing summary of facts (pp. 4-19) Labor simply had no case.

The District Court held, as Labor appears to concede, that Labor had the burden of proving that the jobs of heavy cleaner and light cleaner at Columbia University are equal, requiring equal skill, equal effort and equal responsibility, and are performed under similar working conditions.

Corning Glass Works v. Brennan, 417 U.S. 188 (1974)

Hodgson v. Golden Isles Convalescent Homes, Inc., 468 F.2d 1256 (5th Cir. 1972)

The statute mandates that the court examine the specific job content in detail to see if, in fact, the jobs require equal skill, equal effort and equal responsibility and are performed under similar working conditions.

Corning Glass Works v. Brennan, supra at pp. 200-201

Because the actual job requirements are so critical, precedents have limited value; each case must be determined on its own particular facts.

Hodgson v. Golden Isles Convalescent Homes, Inc., supra

Hodgson v. Brookhaven General Hospital, 470 F.2d 729 (5th Cir. 1972)

Brennan v. South Davis Community Hospital,
— F.2d —, 22 WH Cases 1153 (10th Cir. 1976)

The District Court considered the issues and the evidence in accordance with these principles (Opinion 22-23a). First, the court considered the job descriptions prepared in 1969, several years before any claims were made, and incorporated by reference in collective bargaining agreements since 1970 (Opinion 17-18a, 20a, 24a). Labor undertook to prove that the job descriptions were not followed in actual practice (322-23a), that they did not accurately set forth the duties performed (323a) and were, in fact, "paper descriptions" (325a). Contrary to Labor's position, the court found on abundant evidence that the University's job descriptions accurately reflected the actual duties of the employees in each job category (Opinion 18-21a, 23-24a) and that they clearly delineated two different jobs (Opinion 17-18a, 20a and 23-24a).

Going beyond the contractual job descriptions, the District Court examined the work performed from at least

three viewpoints—the tasks performed, the areas assigned and the equipment used (Opinion 18-20a, 24a). From each perspective the court correctly found that the differences between heavy cleaner and light cleaner were long-standing (Opinion 17-18a) and readily apparent (Opinion 18-21a, and 24a).

The District Court found that heavy cleaners perform, on a daily basis, heavy cleaning tasks such as removing heavy rubbish and garbage, cleaning and sanitizing public lavatories and wet-mopping corridors, stairways, elevators and lobbies (Opinion 18a). In contrast, the court found that light cleaners, in accordance with their job descriptions, are limited to the performance of light cleaning tasks, such as dusting desks, tables and chairs, dust-mopping floors, vacuuming, spot cleaning walls (no higher than they can reach), polishing desks, emptying ashtrays and, with some exceptions, wastebaskets (Opinion 20a). When absences occur light cleaners are instructed to fill in for other light cleaners but they are never required to fill in for heavy cleaners (Opinion 20a; Statement of Facts, *supra*, par. 16, and sources cited therein). As demonstrated in the foregoing summary of facts, these findings are supported by substantial evidence (Statement of Facts, *supra*, pars. 9, 10 and 16 and citations therein).

The District Court found that heavy cleaners are assigned to lobbies, stairways, elevators and public lavatories—public areas used by countless persons each day (Opinion 18a). Heavy cleaners are also assigned to high places requiring the use of ladders (Opinion 18a). As the court found, heavy cleaners are also responsible for all the custodial work which is performed alone, at night, in off-campus buildings located outside the University's security perimeter (Opinion 18-19a). In contrast, the court found that light cleaners are assigned to reading rooms,

seminar rooms, laboratories, classrooms, offices and some private lavatories (Opinion 20a). These findings are also supported by substantial evidence (Statement of Facts, *supra*, pars. 12, 13, 14 and 17).

Labor claims (Brief, p. 19) that there is nothing in the record to support the District Court's "assumption" that the public areas assigned to the heavy cleaners require more cleaning effort than the "less trafficked areas" assigned to the light cleaners. The best answer to Labor's contention lies in the trial testimony given by Labor's own expert witness, Mr. Gubb. Referring to institutions such as Columbia University (925-26a) Mr. Gubb testified:

Q. These are institutions whose hallways, elevators, lobbies, and lavatories are used by hundreds or even thousands of people each day?

A. Yes.

Q. Is it true that the greater use given an area, the greater concentration of dirt and grime?

A. Yes.

Q. Therefore, the greater cleaning effort required?

Ms. Rodenhausen: Objection.

Ms. Goodman: Objection.

Ms. Rodenhausen: Objection to the word "effort", your Honor.

Q. If you have more dirt and more grime, and it's more concentrated, it requires a greater cleaning effort to remove that dirt and that grime; isn't that so?

Ms. Goodman: Objection your Honor.

The Court: No, overruled. I will permit it.

You may inquire on redirect if you wish.

A. Yes. (926-27a)

Labor also overlooks the testimony of Shervington, as well as Cordero, Requeijo and Sampson, confirming the obvious differences in cleaning public lavatories used by hundreds of persons daily and a small toilet in a dean's office (*Shervington* 1270-71a, 1405-07a; *Sampson* 355-58a; *Cordero* 486-91a; *Requeijo* 890-91a, 893a, 901-02a, 1006-09a).

The District Court found that the heavy cleaners used heavy wet-mopping equipment, trash trucks, industrial type wet/dry vacuum cleaners, pile lifters, ladders and scaffolding and 55 gallon drums* (Opinion 18-20a). In contrast, the District Court found that the light cleaners' equipment consists of rags, sponges, dustpans, dust mops, toy brooms, upright household vacuum cleaners, manual carpet sweepers and occasionally light wet-mopping equipment (Opinion 20a). Some light cleaners carry their equipment in wastemobiles, carts, pails or shopping bags (Opinion 20a). These findings by the District Court, like all others, are supported by substantial evidence (Statement of Facts, *supra*, pars. 9, 15, 18 and 19 and citations therein).

The District Court correctly found, from the testimony adduced at the trial, that the job of heavy cleaner clearly involves greater effort than the job of light cleaner (Opinion 24a). This finding is supported not only by the differences just enumerated regarding the tasks performed, areas assigned and equipment used, but also by other direct evidence which Labor does not dare mention.

* The dimensions and weight of this equipment are detailed by the District Court at pages 6-7 of its Opinion (19-20a) and further documented in paragraph 15 of the appellees' Statement of Facts, *supra* and the citations therein. This list does not include the expensive motor-driven floor machines mentioned in the footnote to paragraph 11 of the appellees' Statement of Facts, for which heavy cleaners receive premium pay (Opinion 19 and 24a).

One of the very first witnesses, Mrs. Walker, testified that she did not apply for a heavy cleaner position because she had "never worked as a janitor, that type of work. I worked as a maid." (166a). By "that type of work", Mrs. Walker was referring to the pushing, pulling and lifting required of janitors (167a). Significantly, Mrs. Walker refused a heavy cleaner's job even after it was offered to her (Opinion 29a; 168a). Mrs. Seibert, after a series of questions put by the court, finally conceded that she had declined to seek a heavy cleaner position because, in her words, "I have all I can do with my own work." (852a). The testimony of still another witness called by Labor, Mrs. Ortiz, was even more explicit:

Q. Mrs. Ortiz, have you seen notices for job openings on that bulletin board?

A. Yes.

Q. Have you seen notices for openings in the heavy-cleaner position and also in the guard position?

A. Yes.

Q. Have you ever signed any of those postings or applied for any of those positions?

Ms. Bodian: Your Honor, we object to this question. It's completely irrelevant to the case.

The Court: Overruled.

A. No, because I cannot do a heavier job than the one I have already (*Ortiz* 809-10a; Opinion 26a.)

Additional evidence, again not mentioned by Labor, confirms the greater effort required of Columbia's heavy cleaners. As found by the District Court, the collective bargaining agreements between the University and the Union have long provided for a grievance procedure which has been used to insure the University's compliance with

the job descriptions (Opinion 20-21a). Since employees and supervisors are well aware of the demarcation line between the duties of the two jobs, most complaints of this nature are resolved at the supervisory level (Opinion 21a).

Two examples should suffice. As noted by the District Court, a group of light cleaners complained in 1971 that they had been obliged to haul heavy garbage at Schermerhorn Extension (Opinion 24a). This was corrected immediately by the night superintendent who directed the heavy cleaners to haul away such trash (Opinion 24a; Statement of Facts, *supra*, par. 20 and sources cited therein). Similarly, prior to June 1972, upon complaint of Mrs. Dickens, a University supervisor directed a heavy cleaner to carry her household vacuum cleaner to another building (where she performed some of her duties) and up several flights of stairs (94-96a).

In view of the foregoing findings, supported by overwhelming evidence, that the heavy cleaners perform different cleaning duties which involve greater effort than those performed by the light cleaners, dismissal of Labor's complaint followed as a matter of course. *Corning Glass Works v. Brennan* and *Hodgson v. Golden Isles Convalescent Homes, Inc.*, *supra*.*

* *Hodgson v. Brookhaven General Hospital*, *supra* and other decisions on which Labor relies including *Schultz v. American Can Co.*, 424 F.2d 356 (8th Cir. 1970) and *Hodgson v. Behrens Drug Co.*, 475 F.2d 1041 (5th Cir. 1973) cannot help the appellant. The three-pronged test set forth in *Brookhaven* is applicable only to those situations where there is a substantial identity or overlap between the two job categories and the employer seeks to justify a pay differential on secondary or tertiary tasks performed by employees in the higher paying category. As Judge Owen found, there is no overlap in the primary duties of heavy cleaners and light cleaners at Columbia (Opinion 18-21a, 24a). Therefore, the *Brookhaven* threshold is not reached.

Recognizing the futility of directly challenging the District Court's documented findings [Appellees' Statement of Facts, *supra*; Fed. R. Civ. P. 52(a)] Labor tries to do with words what it could not do with proof.

First, Labor abandons the case it said it would prove before the District Court. Labor makes no mention of the "pattern" of discrimination which it said it would prove in accordance with the case law and the legislative history. *Brennan v. American Brands, Inc.*, 21 WH Cases 61, 64, 5 E.P.D. ¶8620 (W.D. Ky. 1973); 109 Cong. Rec. 9208 (Rep. Goodell, May 23, 1963); (313-14a; 378a). There is no mention of Labor's undertaking to show that Columbia's job descriptions were sham (322-23a; 325a).

Next, Labor tries to equate the two jobs on grounds that both involve "cleaning" or "custodial" services (Labor's brief pp. 5, 17-18, 22). Labor seems to recognize, as the District Court found, that the two jobs do not overlap with respect to the equipment used or the tasks performed (Labor's brief p. 18). Labor also recognizes that the heavy cleaners are assigned to more heavily trafficked areas which have a greater accumulation of dirt (Labor's brief pp. 19-20). Faced with these differences Labor is forced to compare them and assert that they amount to the same thing. Thus Labor argues that although the heavy cleaners clean the more heavily trafficked areas having a greater accumulation of dirt, the areas assigned to the light cleaners are larger (Labor's brief pp. 19-20). Labor also claims that dust mopping requires as much effort as heavy wet-mopping (Labor's brief pp. 22-23).

There are two flaws in Labor's approach. First, there is no evidence to support Labor's balancing act. Indeed, the evidence is to the contrary. See, for example, Mr. Gardner's testimony concerning the obvious difference in

effort between wet-mopping and dust mopping (1507-16a) and Mr. Gubb's testimony concerning the greater effort required to clean more heavily trafficked areas (925-27a). A more fundamental defect is that the Equal Pay Act was not intended to authorize such comparisons. As Rep. Goodell observed:

"Last year when the House changed the word 'comparable' to 'equal' the clear intention was to narrow the whole concept. We went from 'comparable' to 'equal' meaning that the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.

"We do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say 'they amount to the same thing', and evaluate them so that they come up to the same skill or point." [109 Cong. Rec. 9197, (May 23, 1963)]

Beyond its disregard for Congressional intent, Labor also feels compelled to twist and misconstrue the trial record. A few examples are sufficient:

1. Labor states that two light cleaners, Mrs. Thomas and Mrs. Tookes, were "each responsible for maintaining a ten-story building." (Labor's brief p. 9) No mention is made of the heavy cleaners who, as each of these witnesses confirms, perform all of the heavy cleaning in their buildings (*Thomas* 566-72a; *Tookes* 638-41a). Moreover, both confirm that when light cleaners are asked to perform heavy cleaning duties, they receive heavy cleaner pay (*Thomas* 553-60a; *Tookes* 641-45a).

2. Labor states that the light cleaners, like heavy cleaners, clean corridors, hallways and other "common" areas (Labor's brief pp. 8, 9, 10, 13 and 22). Such general characterizations cannot obscure the heavy duties performed by the heavy cleaners in these areas or the fact that light cleaners' corridor work is limited to dust mopping or carpetsweeping (See, for example, *Phillips* 579a; *Tookes* 634a; *Ortiz* 801a; *Stampp* 833a and *Isabell* 1012a).

3. Labor states that the light cleaners, like the heavy cleaners, empty garbage and trash (Labor's brief pp. 9, 13 and 22). Labor fails, however, to recognize the differences in weight. Light cleaners, simply empty wastebaskets and ashtrays into plastic bags with loads usually ranging from 10 to 20 lbs. (*Barish* 1113a). Moreover, the light cleaners themselves have complete control over how much wastepaper and ashes they will collect in any one bag (*Seibert* 868a).

Heavy cleaners, in contrast, are charged with the duty, on a daily basis, of loading and pushing trash trucks ranging in weight up to 800 lbs. (*Opinion* 18-19a; appellees' Statement of Facts, *supra*, pars. 7, 9, 10 and 15(b) and sources cited therein). Significantly, in those buildings where wastebaskets may be expected to contain heavy loads, such as Journalism and Havemeyer, heavy cleaners are assigned to this task (*Opinion* 21a; *Shervington* 1273-74a; 1279-81a; 1309-10a; 1424a and 1480a).

Having failed to prove any pattern of discrimination at Morningside Heights, Labor singles out, for special attention, three heavy cleaners who work in a few off-campus buildings which have been converted to academic use (Labor's brief pp. 13-14, 29-31; *Shervington* 1296a).

As found by the District Court, these heavy cleaners performed all of the cleaning in these buildings—heavy and light (Opinion 18-19a; *Shervington* 1296a). Furthermore, the working conditions are not similar. As the District Court found, this work is performed alone, at night, outside the University's security perimeter (See Opinion 19a; and the testimony of *Shervington* at 1295-96a, 1496-98a; *Gardner* at 1524-25a and 1525-26a; and *Mrs. Moss* at 213a). Notably, the last light cleaner to perform even a portion of her duties in these off-campus buildings, Mrs. Dickens, was escorted to the building by a heavy cleaner (who also carried her vacuum cleaner) and was locked inside until her work was completed at which time she was then escorted back to the campus (*Shervington* 1496-98a).

The District Court committed no error in examining how the employees themselves perceive the jobs of heavy cleaner and light cleaner. Thus, the Court correctly received and considered testimony concerning collective bargaining negotiations, grievance procedures and the light cleaners' responses to job openings in the heavy cleaner category (Opinion 16a, 20-22a, 26-28a and 29-31a). Upon viewing the jobs from these additional perspectives the District Court could find no proof that the light cleaners considered the two jobs to be the same. Thus, the Union's collective bargaining representatives, which included light cleaners, did not ask that the two jobs receive the same pay (Opinion 22a). Moreover, the light cleaners complained whenever they were asked to do work which they considered beyond the light cleaning duties set forth in their job descriptions (Opinion 20-21a and 24a).

The District Court also properly considered the light cleaners' responses to heavy cleaner job openings. First, as the District Court found, women have long been included in the heavy cleaner category—on a full time as

well as part time basis (Opinion 16-17a). Second, the court found that since 1972 light cleaners, well aware of job openings in the higher paying heavy cleaner category (for which they would have first priority), failed to apply (Opinion 26-27a).

Realizing the potent effect of this fact Labor asserts (Brief pp. 38-39) that there are "too many plausible explanations" to infer why so many light cleaners have not accepted these opportunities for higher pay. The simple fact is that they did not apply because the heavy cleaner job is harder. There is no need to speculate; Labor's own witnesses gave direct evidence on this point (Opinion 26a). Mrs. Walker never applied because she had never done "that type of work" referring to the pushing, pulling and lifting required of heavy cleaners (166-68a). Mrs. Seibert admitted that she did not apply because a light cleaner's job was all she could handle (852a). Mrs. Ortiz frankly stated that she never applied for a heavy cleaner position because "I cannot do a heavier job than the one I have already." (810a).

CONCLUSION

The District Court should be affirmed.

Dated: New York, New York
September 24, 1976

Respectfully submitted,

THACHER, PROFFITT & WOOD
Attorneys for Appellees

ROBERT S. STITT,
ANTHONY LIMITONE, JR.,
RAYMOND L. VANDENBERG,
Of Counsel.

80-274-5501